Supreme Court of the United States

OCTOBER TERM, 1924

No. 183

C. O. LINDER, PETITIONER

vs.

THE UNITED STATES OF AMERICA

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER

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STATEMENT.

This case comes here on certiorari to the Circuit Court of Appeals for the Ninth Circuit. The error relied on in the case is that the indictment fails to state facts sufficient to constitute an offense under the laws of the United States. There was no specification of error to that effect in the court below, and we do not understand that a formal assignment of error is required in this court in a case here on certior-

ari, other than as may appear in the record sent up. On the question of our right to urge here that the indictment fails to state an offense, notwithstanding failure to urge the point below, we rely on our brief in aid of the petition for certiorari, and beg the court to refer to the arguments therein as if included in this brief.

The petitioner was convicted on the second count of an indictment which, omitting formal parts, charged:

> "That Charles O. Linder * * * did then and there knowingly, wilfully and unlawfully sell, barter and give to Ida Casey, a compound, manufacture and derivative of opium, to-wit: One (1) tablet of morphine and a compound, manufacture and derivative of coca leaves, to-wit: Three (3) tablets of cocaine, not in pursuance of any written order of Ida Casey on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that Ida Casey did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or conditions other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to Ida Casey by the defendant or any nurse, or person acting under the direction

of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for consumption." (Transcript of Record, pp. 3, 4, 5.)

The said count is predicated on Section 2 of the Act of Congress (commonly called the Harrison Act), approved December 17, 1914, 38 Stat. L. 785. That Section, so far as it is material to the case, reads as follows:

"Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof, shall sell, barter, exchange, or give away any of the aforesaid drugs,

shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in Section Five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this Section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written

> prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: Provided, however, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same; And provided further, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned."

The Harrison Act has since been amended in a number of particulars, but in no particular material to the present case.

In this brief we present three questions, namely:

First: Do the facts set up in the indictment constitute an offense under the Narcotic Act when the latter is properly construed?

Second: Do the facts set up constitute an offense under the construction of the Narcotic Act prevailing in the lower Federal Courts?

Third. If the Narcotic Act can be so construed as to make said facts an offense under either construction, is it a constitutional exercise of power?

ARGUMENT.

First

Taking the worst side of it, the transaction set out in the indictment presents a case of the administration by a licensed physician of one morphine tablet and three cocaine tablets to a confirmed addict for the purpose of catering to the craving of the addict for such drugs.

The allegation of the indictment "that Ida Casey was not in any way restricted from disposing of the drugs in any manner she saw fit," etc., does not add anything material as showing a case in which the revenue features of the Act might be defeated. The indictment alleges in other parts that "Ida Casey was a person addicted to the habitual use of morphine and cocaine" * * * and "that all the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey would use the same by self-administration in divided doses over a period of time," etc. That period of time in the case of an addict possessing only four tablets, according to the literature on the subject, would be very short, probably infinitesimal, because the tablets would all be used by the addict before the craving that induced their purchase would be satisfied. It

cannot be presumed, because it is contrary to the pathology of drug addiction, that the addict would part with any of the four tablets to another instead of using them herself. The allegation, therefore, is a mere form of words without substance. Moreover, the law contemplates (sub-section a, section 2) that the drugs may be put in possession of the patient for self-administration, when it excepts from the preceding prohibitions of the section, *"the dispensing* or *distribution* of any of the aforesaid drugs to a patient by a physician," etc. The allegation in question then can raise no implication that the operation of the law might be prejudicially affected, because the law itself contemplates as lawful a situation in which the patient is "not in any way restrained or prevented from disposing of the drugs in any manner she saw fit," etc.

Now there is nothing, we submit, in the Narcotic Act, properly construed, that makes it an offense for a physician to alleviate the sufferings of an addict by administering to the latter narcotic drugs in quantities sufficient for the purpose. Section 2 of the Act makes it unlawful for any person to "sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the

Commissioner of Internal Revenue," etc. Sub-section (a) of the section then excepts from the above provision "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under the Act in the course of his professional practice only." The lower courts have engrafted on this exception without any sufficient reason the further requirement that the dispensing or distribution must not only have been in the course of the professional practice of the physician, but that it must have been dispensed or distributed in good faith as a medicine, and not to satisfy the cravings of an addict. The prevailing doctrine in the lower federal courts is that set forth by Judge Rudkin in his instructions to the jury in this case, in the following language:

> "Were these drugs dispensed in good faith, within the proprietary bounds of professional practice, or were they knowingly dispensed for the purpose of catering to the use of one addicted to the use of narcotics? That is the principal question in this case." (Transcript of Record, p. 169.)

Other cases holding the same doctrine are Manning vs. United States, 287 Federal, 800; Melanson vs. United States, 356 Federal, 783; Thompson vs. United States, 258 Federal, 196.

The term "addict" is not used in the entire Narcotic Act, and the only mention therein of "good faith" is found in Section 8, where, after making it unlawful for any person not registered to have in possession or under his control any of the aforementioned drugs, a number of exceptions are made, among which is an exception in favor of those having possession of drugs which may "have been prescribed in good faith by a physician, dentist or veterinary surgeon registered under this Act." Apart from the difficulty of applying provisions relating to one offense to another separate and distinct offense, there are two other very good reasons why the good faith provision in the above exception can have no reference to or influence in construing the exception in favor of registered physicians provided for by sub-section (a) of Section 2. The first is the decision of this court in Jin Fuey Moy vs. United States, 241 U. S. 394, in which it was determined that the provision of Section 8 against having drugs in possession must be construed as levelled at those only required to register and entitled to register and to procure order blanks, and not to the common, ordinary run of citizens, and consequently the good faith provision can have no reference to the dispensing and distribution of drugs to the latter class, because the latter class are not entitled to register or to procure order blanks.

Second. An exception to the having drugs in possession cannot under the ordinary rules of construction be imported in to the exception in favor of registered physicians dispensing or distributing the drugs. The two things are entirely different in the considerations which goven them and in the gravity of the Act as tending to impair the revenue features of the law. A person entitled to register, but not registered, having the drugs in possession, may very well be considered as presumptively engaged in their clandestine distribution, and therefore to be protected in their possession only by a good faith prescription, and the good faith of the prescription as to him be matter of proper concern. A registered physician, on the other hand, dispensing the drugs to patients and keeping the record thereof required, is above board at least, whatever the motive for the dispensing the drugs, and no harm can accrue to the administration of the law by his act, or if harm come, it is infinitesimal, and not worthy of consideration under the maxim *De minimus non curet lex.*

Now if the exception found in Section 2 stands alone, and is not influenced by anything except the general purpose of the law, what dispensing or distribution of drugs to patients may be reasonably con-

sidered as "in the course of his professional practice only?" That question, we submit, cannot be answered by the application of any hard and fast rule. It is the business of the physician to alleviate the pain and suffering of patients as well as to effectuate their cure. If we are to believe the literature on the subject, the suffering of an addict caused by deprivation of his customary drug is as intense as any suffering caused by disease. It is perhaps more so in the insistent demand for relief. Why should not the physician in the course of his ordinary practice take cognizance of that fact and administer temporary relief? Why should the law be construed as intended to prohibit such an act of mercy? It is, we submit, a strained construction of the law to hold that the language in question was intended to prohibit such an act, especially in view of the fact that the entire frame work of the law shows that it was intended, not to regulate health and morals because Congress has no authority or duty in that direction, but to make regulations with respect to the drug traffic which would keep it above board for the benefit of states and municipalities which do have authority and duty in that direction. The latter fact ought to have influence in the construction of the language in question. If Congress had undertaken in terms to make it an offense for any

person to administer drugs to an addict to satisfy the cravings of the latter, it is at least questionable if such a provision would not be void as invading the reserved powers of the states. Now the language of the Act cannot be given a construction which would make it do indirectly what it could not do directly. In the case of Jin Fuey Moy vs. United States, *supra*, the positive terms of the Narcotic Act were limited in their fair meaning in deference to doubts of their constitutionality if given full force and effect. Here it is not necessary to limit the fair meaning of the language of the Act. It is only necessary to refuse to stretch the language of the Act beyond its fair meaning so as to make it include acts never contemplated by the law-makers. We submit that the transaction set out in the indictment fails to state any offense under the Narcotic Act when the latter is properly construed.

SECOND

We submit that the indictment states no offense even under the construction of the Narcotic Act prevailing in the lower courts. The indictment follows literally that set out in United States vs. Behrman, 258 U. S. 280, except that the quantity of the drug dispensed in that case by and through a single pre-

scription was 150 grains heroin, 360 grains morphine and 210 grains cocaine. In this case the quantity dispensed was one tablet of morphine and three tablets of cocaine. The quantity contained in each of the tablets is not alleged, but the term tablet is well understood. The Standard Dictionary defines tablet as "a definite portion or weight of drug brought by pressure and the addition of a gum into a solid form convenient for administering." A tablet, then, must be taken to contain such quantity of the drug as is appropriate to a single dose.

We submit that there is nothing in the indictment to negative that the drugs were dispensed in good faith in the ordinary course of professional practice. It is a well-known fact that one of the means of treating addiction to morphine, or any of the habit-forming drugs, is the administration of diminishing quantities of the drug until the addict is finally weaned away from the habit. The Internal Revenue Bureau call this the "reductive ambulatory treatment of addiction." That Bureau, moreover, while not giving its approval to the so-called "reductive ambulatory treatment" does recognize the propriety and necessity of administering the drug to addicts in certain cases. In a circular to narcotic agents, dated May 21, 1923, signed by R. A. Haynes, Prohibition Commissioner, and approved by

D. H. Blair, Commissioner of Internal Revenue, it is said:

> "Addicts suffering from senility or the infirmities attendant upon old age, and who are confirmed addicts of years' standing may be, for the purpose of enforcing the law, treated as addicts suffering from incurable diseases. In such cases, where narcotic drugs are necessary in order to sustain life, a reputable physician may prescribe or dispense the minimum amount necessary to meet the absolute needs of the patient."

There is nothing in the indictment which negatives that the drugs were dispensed as a part of such a treatment of the addict, Ida Casey, and that she was a confirmed addict of years' standing and suffering from senility or the infirmities of age. On the contrary, the allegation that "defendant did not dispense any of the morphine for the purpose of treating any disease or condition other than such addiction," raises the necessary inference that the drug was dispensed for the purpose of treating such addiction; an inference which is strengthened by the further allegation that the drug was dispensed with the "intention that Ida Casey would use the same by self-administration in divided doses extending over a period of time."

As we read the case of United States vs. Behrman, *supra,* the indictment in which case was taken as a model in this, it was only the extraordinary quantity

of the drug dispensed in that case—three thousand ordinary doses—that enabled the court to find in the acts charged in the indictment an infraction of the law. Mr. Justice Day said in that case:

> "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the Act."

Mr. Justice Holmes, in his dissenting opinion, concurred in by Mr. Justice Brandies and Mr. Justice McReynolds, could not see, even in the large quantity alleged to have been dispensed, an infraction of the Act. He said:

> "The indictment for the very purpose of raising the issue that divides the court, alleges in terms that the drugs were intended by the defendant to be used by King in divided doses over a period of several days. The defendant was a licensed physician and his part in the sale was the giving of prescription for the drugs. In view of the allegation that I have quoted, and the absence of any charge to the contrary, it must be assumed that he gave them in the regular course of his practice, and in good faith."

But the majority of the court found in the unusual and unnecessary quantity of the drug prescribed, evidence to the contrary, and so held. We think the language of Mr. Justice Holmes strictly applicable to the present indictment, as also the qualifying language of Mr. Justice Day, and that we need not recur to the

terms of the statute and the ordinary principles of criminal pleading in aid of our contention that the indictment in the cases states no offense, no matter what construction be given to the statute in other respects.

THIRD

The Narcotic Act is unconstitutional if susceptible of the construction of its terms prevailing in the lower courts. The power of the states to regulate their own domestic concerns is exclusive, and any effort of the national government to intervene in that particular domain of power is unconstitutional and of no effect. The above proposition has been stated so often by this court, and by the state courts, and is so well understood as a principle of our dual form of government, that it would be academic to cite in its support any considerable number of the available authorities.

Congress may, however, legislate in aid of some express grant of national power, such as the power to tax, regulate commerce, to establish post roads, to raise armies and make war, and may make regulations and impose penalties in aid of such grant which may seem to intrude on the reserved power of the states, but the intrusion is apparent rather than real. Congress in doing that does not intend or attempt to regu-

late the health or morals of the states. It is simply legislating in aid of the national power, and in that domain of power its authority is equally supreme. Sometimes, however, the legislation of Congress in aid of the national power has no relation to it, no real influence in aiding or promoting it. In such cases, if the legislation trenches on the reserved power of the states it must fall, because the Federal necessity for it is non-existent.

We take it that this principle governs also where it is sought in a criminal prosecution to bring within the purview of the federal law a transaction which the language of the law is broad enough to include, but which, by reason of its nature is beyond the power of Congress to regulate or prohibit. Whether the holding of the courts in such a case ought to be that the law is unconstitutional in part, or that the transaction not being within the power of Congress to regulate or prohibit is impliedly excepted from the prohibition found in the law, it is not material to consider, because either holding will answer the purposes of the review here sought by the petitioner.

At the risk of appearing tedious, we notice three cases in this court, two of them early cases, and one a late case, in which the foregoing principles were illustrated, namely, License Tax Cases, 5 Wallace, 462; United States vs. Dewitt, 9 Wallace, 41 and Keller vs. United States, 213 U. S. 138.

In the first of the above cases Mr. Justice Miller described the exclusive power of the states thus:

> "We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.
>
> This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the acts of Congress for selling liquor and lottery tickets confer any authority whatever?
>
> It is not doubted that where Congress possesses

constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.

Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress

cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution."

In the second case, Chief Justice Chase pointed out the vice of congressional enactments having no relation to the federal grant on which they were predicated, or too remote and uncertain in that regard, in the following language:

"It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regualtions referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly the succeeding Congress, may be inferred from the circumstances, that while all special taxes on illuminating oils were repealed by the Act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legsilation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

In the third of the cases cited, a statute having the general purpose of regulating immigration of aliens into the United States, made it an offense, among other things, to "keep, maintain, control, support or harbor in any house or other place, for the purpose of

prostitution, or for any other immoral purpose, an alien woman or a girl, within three years after she shall have entered the United States." In holding the action of Congress in that respect to be beyond its constitutional power, Mr. Justice Brewer, speaking for this court said:

> "As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it; and the testimony shows, without any contradiction, that the woman Irene Bodi came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago, and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts, the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial.
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> The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determines the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all

the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation. By the census of 1900, the population of the United States between the oceans was, in round numbers, 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the government be sound, whatever may have been done in the past, however, little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the states, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. Fairbank vs. United States, 181 U. S.

283, L. Ed. 862, 21 Sup. Ct. Rep. 648. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in Texas vs. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.' ".

This court has pronounced the Narcotic Act to be a revenue measure. It is bottomed on the constitutional power to levy taxes. Mr. Justice Holmes, in his opinion in Jin Fuey Moy vs. United States, *supra*, stated the contention of the government in that case thus:

> "The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention; that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature," etc.

The court in that case, however, avoided the issue by so limiting the language of the Act, as to avoid bringing within its terms a class of persons clearly included therein. In other cases where national legislation *strained the powers of the legislature*, this court, pursuant to a long line of decisions, has declared that

deference to a co-ordinate department of the government would not permit it to go behind the declared purposes of the legislation. Deference by this court to the legislative department of the government has become so firmly established, even in cases where the pretense of enforcing federal power was a transparent subterfuge, that it would be futile, and perhaps not entirely respectful, to now attack that view of judicial duty. But it is permissible, we believe, to suggest that a strict rule concerning the relation of a prohibited act to the federal grant of power on which it is predicated ought to be maintained by this court. Congress is every day, more and more, yielding to the meddling spirit that would draw every activity in life within the purview of its constitutional power, and unless such rule of decision is laid down and maintained, the doctrine that the states are supreme in matters of police will soon be completely overturned.

It is that doctrine that we are invoking in this case. If the mere catering to a diseased appetite in the matter of narcotic drugs, even where such catering has no tendency to impair the revenue features of the Narcotic Act, or so slight a tendency as to be negligeable be held to be within the prohibition of that Act, then the said Act to that extent is clearly unconstitutional. And we submit that this court in measuring

the character of transactions to determine whether they really impair the revenue features of the law, is hampered by no consideration of deference to a co-ordinate department of the government, but should predicate its holding strictly on the reason of the thing. Moreover, it should not be astute to find reasons that would reconcile the prohibition of the law with the pretended federal purpose behind it. If the line of demarcation between federal and state power is to be maintained in its integrity that matter should be determined on broad lines of reason and common sense. We are not suggesting that this court has been governed in the past by any other line of reasoning. On the contrary, the cases in this court dealing with transactions alleged as coming under the Narcotic Law, have indicated a keen appreciation of the necessity of a real tendency inherent in such transactions to materially influence or effect the constitutional purposes of the federal law, if such transactions are to be considered as coming within the legitimate province of the law. The transaction here, as set out in the indictment, and as evidenced by the proofs in the record, presents a case of the administration by a licensed physician of one morphine tablet and three cocaine tablets to a confirmed addict for the purpose of catering to the appetite of the addict. Now can

it be said with reason that such a transaction, reprehensible as it is, has any tendency to defeat the revenue features of the Narcotic Act? Even if the allegation of the indictment that "Ida Casey was not restrained from disposing of the drugs in any manner she saw fit," be considered one of substance, is not that in all cases one of the necessary incidents of the administration of such drugs by a physician and contemplated by the law, and without that, is not the possibility suggested by the allegation so remote and so inconsequential where the quantity of the drugs are as small as in this case, that it ought not to be considered as an act materially affecting the revenue features of the law? It seems so to us. The not unnatural tendency to sustain prosecutions brought for acts indicating moral perversion has induced many courts to lose sight of grave constitutional questions involved in such cases, but this court has not in the past given way to that tendency, and we feel assured will not do so in this case. It has been well said that "Hard cases make bad law," but that tendency ought to be doubly resisted by a court whose greatest function is to keep the government within its constitutional limits, where the tendency is not only to make bad law, but to make bad constitutional law. There is a twilight zone between transactions which really impair the integrity

of the law and transactions in which that tendency is so slight as to come within the *de minimus* maxim, and acts within that zone, we submit, ought on every conceivable ground, to be held within the exclusive power of the states to regulate and prohibit.

The case of United States vs. Behrman, 258 U. S. 280 (the last case in this court), appears to proceed in all respects on the line of reasoning we have been pursuing. The indictment in that case was identical in all its features with that in this case, except that the drugs were there dispensed by and through a prescription which called for 150 grains of heroin, 360 grains of morphine and 210 grains of cocaine. The court seems to have sustained the indictment only because of the enormous quantity of the drugs alleged to have been dispensed. Mr. Justice Day said in reasoning the case:

> "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the act; but what is here charged is that the defendant physician, by means of prescriptions, has enabled one, known to him to be an addict, to obtain from a pharmacist the enormous number of doses contained in 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine. As shown by Wood's United States Dispensatory, a standard work in general use, the ordinary dose of morphine is one-fifth of a grain, of cocaine one-

> eighth to one-fourth of a grain, of heroin one-sixteenth to one-eighth of a grain. By these standards more than three thousand ordinary doses were placed in the control of King. Undoubtedly doses may be varied to suit different cases, as determined by the judgment of a physician. But the quantities named in the indictment are charged to have been intrusted to a person known by the physician to be an addict, without restraint upon him in its administration or disposition by anything more than his own weakened and perverted will. Such so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs, or result in an unlawful parting with them to others, in violation of the act as heretofore interpreted in this court, within the principles laid down in the Webb and Jim Fuey Moy Cases, *supra*."

The exception made by Mr. Justice Day in favor of cases where "a single dose or even a number of doses" were administered was forced, we submit, by a consideration of the constitutional principle to which we have been appealing. It is true that Justice Day in concluding his reasoning linked together as objectionable features of the transaction set forth in the indictment "the gratification of a diseased appetite for these pernicious drugs," and "an unlawful parting with them to others in violation of the act," but since the learned Justice was considering the language of the Narcotic Act alone, and for the purposes of the indictment alone, it seems probable that the difficulty of including in the same constitutional class the two

consequences enumerated, did not occur to him. The suggestion to that effect is greatly strengthened when it is remembered that if catering to a diseased appetite was in any sense a part of the offense denounced by the law, a single dose would have been as effective to that end as any number of doses.

The first of the cases in this court growing out of the Narcotic Act, we believe, was that of Jin Fuey Moy vs. United States, 241 U. S., 294, 66 Law Ed., 1061. The indictment in that case charged a conspiracy to have opium in possession contrary to the provisions of the Act. In consequence of the difficulty of reconciling such a prohibition with the reserved rights of the states, this court, speaking through Mr. Justice Holmes, decided that the offense of having opium in possession denounced by the Act, must be confined to that class of persons with which the statute undertakes to deal, the persons who are required to register by Section 1, saying, "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right." By the words *and within the limits of a revenue measure,* we understand the court

to have meant within the limits necessary to the maintenance in their integrity of the provision of the revenue measure. If the prohibition against having opium in possession by others than those required to register was not essential to the integrity of the Narcotic Act as a revenue measure, was not necessary, in the language of Justice Day, to keep the traffic above board, then certainly the mere fugitive act of catering to the appetite of an addict cannot be said to be essential to that end.

The succeeding case of U. S. vs. Doremus, 249 U. S., 86, 63 Law Ed., 493, proceeded along the same lines as the last above case, citing from it and quoting from it with approval and measuring the act charged in the indictment by the same test, namely, "Have the provisions in question any relation to the raising of revenues?" Apparently it was the unreasonably large amount of the drug dispensed—500 one-sixth grain tablets of heroin—that induced the holding that the transaction proceeded against did in fact have some relation to the raising of revenue. The court, speaking through Mr. Justice Day, pointed out the relation in the following words:

> "Congress, with full power over the subject, short of arbitrary and unreasonbale action, which is not to be assumed inserted these provisions in

> an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal Law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers, and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least, Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue."

To the decision in that case rendered by a majority of the court, the Chief Justice and Mr. Justice McKenna, Van Devanter and McReynolds dissented on the ground, stated by the Chief Justice as follows:

> "The Chief Justice dissents because he is of opinion that the court below correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated; that is, the reserved police power of the states."

The next case, Webb vs. United States, 249 U. S., 96; 63 Law Ed., p. 497, would appear at first blush

to be irreconcilable with the application made by us of the former decisions. That case came up on a certificate of division of opinion, and among others propounded the following question:

> "3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of Section 2?"

The court answered the question shortly as follows:

> "As to question three, to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

There was the like dissent by the Chief Justice and Justices McKenna, Van Devanter and McReynolds as that made in the Doremus case.

In the first place, it is impossible to think that Justice Day intended to depart from the considered judgment of the court rendered in Jin Fuey Moy vs. United States, *supra*, and United States vs. Doremus, *supra*, especially as in the later case of United States vs. Behrman, *supra*, he maintained the doctrine of those cases, and decided that not one or even a number

of fugitive doses administered by a physician would bring him within the prohibitions of the Act. Justice Day, it would appear, was answering the question propounded in the Webb case, not in the abstract, but in the light of the facts, also certified from below, namely, "that Webb regularly charged 50 cents for each so-called prescription, and within this period had furnished, and Goldbaum had filed, over four thousand such prescriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine, and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Raben's presentation, although each was made out in a separate and ficticious name." Such conduct was a bare-faced palpable fraud on the law, and ought on any view of its purpose be held to constitute a conspiracy to violate it, and, in that view, the abstract question propounded might well be answered in the negative without considering the line of demarcation between a fugitive administration of the drug for immediate effect, and one of such character and size that it might result in impairing the revenue features of the law. Certainly in the preceding cases, and in the later cases of United States vs. Behrman, opinion by Justice Day, this court was careful to con-

fine the scope of its decisions to acts which Congress might constitutionally prohibit because necessary to the effectual enforcement of the Narcotic Act as a revenue measure.

The second case of Jin Fuey Moy vs. United States, 254 U. S., 189, opinion by Mr. Justice Pitney, considered all constitutional questions as settled by former decisions of this court, and looking at the case from the standpoint only of the sufficiency of the evidence which showed continued and persistent issuing of prescriptions of drugs in very large quantities, declared:

> "Manifestly the phrase 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician in dispensing the narcotic drugs mentioned in the act strictly within the bounds of a physician's professional practice, and not to extend it to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the cravings of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it, nor the dealer who knowingly accepts and fills it."

What was said with respect to the Webb case applies to this case, but this case proceeded strictly on the Webb case, citing it to the passage quoted, and without any examination of the principles on which that case proceeded.

If it be thought that the general language in Webb vs. The United States, *supra,* re-affirmed in the second Jin Fuey Moy case, is such, if adhered to, as to logically foreclose the question here raised, then we submit, in view of the fact that there was a dissent by four out of the nine Justices in that case, and in view of the further fact that the language referred to as foreclosing the question is not consistent with the language of the majority opinions in other cases, concurred in by Mr. Justice Day, and in the later case of United States vs. Behrman, opinion by Justice Day, that the matter ought now to be considered *de novo* and an authoritative pronouncement made which will set the question at rest one way or the other.

It is a well-known fact that the lower federal courts are overwhelmed by a mass of business properly belonging to the state courts, thrust on them by congressional legislation ostensibly in aid of some federal grant of power. Under the pretense of raising taxes, of regulating interstate commerce, or of establishing post offices and post roads, an enormous mass of legislation has been built up by Congress, covering almost every conceivable phase of health, morals and police, and thereby, in most cases, by hanging the legislation on a constitutional peg that does not support it, invading the reserved power of the states. A most

glaring but amusing instance of such legislation is that passed for the protection of migratory birds, and making it a criminal offense to hunt and kill certain game and insectivorous birds which pass through and do not remain permanently the entire year within the border of any state or territory. (Act of March 4, 1913, 37 Stat. L. 847.) This Act was predicated, apparently from its reading, on the power of the nation to regulate commerce between the states and between the states and foreign countries, and requires the court to find, if the Act is to be sustained, that a wild goose flying from the Arctic Circle to the Gulf of Mexico, is engaged in interstate commerce.

An observation by Judge Bourquin of the District Court of Montana, with respect to the overleaping tendency of Congress, and its effect on the Federal Courts, is so much in point in this connection that we reproduce it.

> "It is true Congress is constantly restricting the jurisdiction of the federal courts, in only important causes, however, for it is also true that it is constantly extending their jurisdiction to trivial causes and to causes virtually filched from the states' police power, until they are crowded with white slavers, pimps, prostitutes, and panders, drug peddlers and addicts, bootleggers and poachers. This court was lately horrified to find all its machinery in motion and with a jury engaged in trying (God save us) five reputable

citizens upon a charge of having joint possession of one dead hell-diver."

Yellowstone-Merchants' Nat. Bank vs. Rosenbaum Bros. & Co., 277 Fed. R., p. 69.

All this is notorious. It fills the newspapers and is matter of daily comment between citizens. It has engaged the attention of the National Bar Association, and has been under consdieration by the Chief Justice of this court in connection with an effort to find some relief for the submerged Federal District Courts. We suggest as one very natural and efficient means to that end that the legislation of Congress be subjected in all cases to rigid scrutiny with respect to the propriety of the means adopted to secure the pretended constitutional end of such legislation.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

CHARLES O. LINDER, PETITIONER,
v.
THE UNITED STATES. } No. 581.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT.

The petition in the above entitled cause should be denied for the following reasons:

1. The sufficiency of the indictment was not challenged in the trial court, and the opinion of the Circuit Court of Appeals affirming the judgment of conviction discloses that the point was not pressed in that court. In this situation petitioner ought not now be permitted to urge it as an adequate ground for the exercise of this court's discretionary jurisdiction on certiorari.

2. The allegations of the indictment, at least after verdict, and for the purposes of the present petition, support the view that the good faith of the defendant is sufficiently negatived. See *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 194, specifically approved in *United States* v. *Behrman*, 258 U. S. 280, 287, 288.

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3. It is too late to attack the constitutionality of the narcotic statute on the ground that there is a lack of Federal power to punish the dispensing of narcotics to satisfy the mere cravings of addicts where such dispensing is done by those who register and pay the tax. The *Behrman case, supra*, on this point, can not be differentiated from the case at bar on the ground that larger quantities of the drug were involved there than here. The opinion of this court in the *Behrman case, supra*, at page 289, is pertinent. It reads as follows:

> But the quantities named in the indictment are charged to have been entrusted to a person known by the physician to be an addict without restraint upon him in its administration or disposition by anything more than his own weakened and perverted will. Such so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs or result in an unlawful parting with them to others in violation of the act as heretofore interpreted in this court within the principles laid down in the *Webb* and *Jin Fuey Moy cases, supra*.

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OCTOBER, 1923.

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